Supreme Court, U.S.
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No. 93-410

In The

# Supreme Court of the United States

October Term, 1993

JOHN B. UPP, Individually and on behalf of all others similarly situated,

*Petitioner,*

v.

MELLON BANK, N.A.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT MELLON BANK, N.A.

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## QUESTION PRESENTED

Did the Court of Appeals err in finding that class members in a diversity-based action, pursuing separate and distinct claims, cannot satisfy the jurisdictional amount-in-controversy requirement by valuing the requested injunctive relief from the defendant's perspective and thereby aggregating the individual class members' claims, particularly where the issue was not properly presented below and where the lower court has already surrendered jurisdiction?

## RULE 29.1 STATEMENT

Respondent Mellon Bank, N.A., is a wholly-owned subsidiary of Mellon Bank Corporation.

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## BRIEF IN OPPOSITION OF RESPONDENT MELLON BANK, N.A.

## JURISDICTION

The Court of Appeals entered judgment on May 18, 1993, directing the district court to dismiss this case for lack of subject matter jurisdiction. Petitioner John B. Upp's petition for rehearing with suggestion for rehearing *en banc* was denied on June 18, 1993, and on June 28, 1993, the Court of Appeals issued a mandate directing that the case be dismissed. Mr. Upp did not attempt to stay or recall the mandate, and the district court dismissed the case for lack of jurisdiction on July 6, 1993.

Mr. Upp waited until September 13, 1993 to file his Petition for Writ of Certiorari ("Cert. Petition") and purports to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

The issuance of the mandate and the dismissal of the action by the district court terminated the lower courts' jurisdiction over this matter. *See, e.g., Johnson v. Bechtel Assocs. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986).

## STATEMENT OF THE CASE

Respondent adopts the statement of the facts in the opinion of the Court of Appeals. *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1042-44 (3d Cir. 1993); Appendix to Cert. Petition ("App.") 3-7.

## ARGUMENT

### A. Mr. Upp Attempts To Present An Issue That Is Not Properly Before This Court.

Mr. Upp argues that the object of this litigation was an injunction prohibiting Mellon from charging allegedly unreasonable sweep fees, and that said injunction should have been valued from the defendant's viewpoint, *i.e.*, the total cost to Mellon of complying with an order granting class-wide relief (the "Total Detriment Rule"). Mr. Upp, however, did not adequately present or preserve this issue below. As the Court of Appeals explained, "[t]he only truly equitable relief sought in this case is an order requiring Mellon to provide adequate notice of its sweep

fees to trust beneficiaries and to tie future sweep fees to the cost of providing the service." App. 23. The Court of Appeals found, however,

> Plaintiff . . . has not presented the district court with any data whatsoever regarding Mellon's estimated cost of complyi g with such an order. Accordingly, we could not consider that cost even if we were to agree with [Mr. Upp's] 'defendant's cost' theory.

*Id.* This Court should not be asked to reverse the Court of Appeals' decision on an issue that was not adequately presented to the district court or to the Court of Appeals. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 & n.23 (1989); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987).

Further, Mr. Upp's utter failure to present any evidence of the value of an injunction belies his claim that this request for a class-wide injunction was "possibly the most important part" of the matter in controversy. Cert. Petition 13-14. Mr. Upp's complaint did not even allege the absence of an adequate remedy at law (*See* App. 46-56), a prerequisite for injunctive relief. *See International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987). Additionally, the only evidence presented to the district court was in pursuit of monetary relief, and as the Court of Appeals correctly explained, "[A] plaintiff may not turn what is essentially a legal claim into an equitable one merely by demanding an injunction requiring the payment of money. Here, virtually all the relief sought is remediable by money damages." App. 22-23 (citations omitted).

Moreover, even if injunctive relief were appropriate in this instance, and even if the injunction could be

measured by the fees that Mellon charged Mr. Upp, petitioner may not satisfy the requisite amount in controversy by projecting the allegedly improper fee years into the future. *See Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (amount in controversy in suit to restrain imposition of an illegal fee is measured by the amount of the fee that normally would be collected during the period of the litigation); *Healy v. Ratta*, 292 U.S. 263, 272 (1934) (amount in controversy is to be determined by total amount charged within "time reasonably required to conclude the litigation" because claim regarding future charges is "at most conjectural" and effect of decree on future charges "is collateral to the present controversy"); *M & M Transp. Co. v. City of New York*, 186 F.2d 157, 158 (2d Cir. 1950) (possible future damages are not considered when determining the amount in controversy for an injunction).[1] Thus, even under Mr. Upp's theory, an injunction would not satisfy the requisite amount in controversy.

Finally, Mr. Upp's failure to stay or recall the mandate of the Court of Appeals has resulted in the termination of that court's jurisdiction over this matter and in the dismissal of the action by the district court. *See, e.g.*,

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[1] Mr. Upp paid only $4,012.14 in fees over the eleven years at issue. App. 4. At that rate, it would take another 126 years for him to reach $50,000 in fees. Of course, under the principles announced in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), such an injunction regulating sweep fees into the future would be inappropriate in the face of state court decisions finding precisely the same sweep fee lawful and reasonable. *Bigelow Trust*, 12 Fiduc.Rep.2d 256 (O.C. Mont. Co. 1992), *aff'd*, Nos. 3347 & 3348 Philadelphia, 1992 (Pa. Super. June 22, 1993); *Packard Trust*, 12 Fiduc.Rep.2d 148 (O.C. Mont. Co. 1992).

*Johnson*, 801 F.2d at 415. There is, quite simply, no case "in the court of appeals" to which the Writ of Certiorari could attach. *See* 28 U.S.C. § 1254. Nor would any equitable consideration appear to weigh in favor of an order of recall or reinstatement by this Court.

### B. No Court Has Ever Held That *Hunt v. Washington State Apple Advertising Commission* Overruled *Snyder v. Harris.*

The rule that individual plaintiffs in a class action may not aggregate their separate and distinct claims in order to reach the requisite amount in controversy is beyond question. *Snyder v. Harris*, 394 U.S. 332, 338 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). There is no split among the circuits on the issue of aggregation, and review by this Court is unnecessary. *See* Sup. Ct. R. 10.1(a).

In fact, courts have uniformly applied the rule against aggregation, even in class actions in which an injunction is appropriately sought. *See Burns v. Massachusetts Mut. Life Ins. Co.*, 820 F.2d 246, 248-50 (8th Cir. 1987) (amount in controversy in a class action seeking injunctive relief is measured by the value to the individual plaintiff of the right sought to be enforced); *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) ("The threshold question is aggregation . . . [and] where 'the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation [applies] with equal force to the equitable as well as the monetary relief.' "); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 682-83 n.11 (9th Cir. 1976) (*Zahn*

and *Snyder* prohibit aggregation in all class actions); *Amen v. City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976) ("We construe *Zahn* . . . to prohibit aggregation whenever the class members assert 'separate and distinct' claims, or demands, irrespective of whether the district court certified the classes to be 23(b)(1), 23(b)(2) or 23(b)(3)."); *Givens v. W. T. Grant Co.*, 457 F.2d 612, 614 n.4 (2d Cir.) ("We hold that separate and distinct claims may not be aggregated in a class suit pursuant to Fed. R. Civ. P. 23(b)(2) for purposes of satisfying the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1332."), *vacated on other grounds*, 409 U.S. 56 (1972); *Russo v. Kirby*, 453 F.2d 548, 551 (2d Cir. 1971) (aggregation of claims is impermissible in class action for declaratory and injunctive relief); *Massachusetts State Pharm. Ass'n v. Federal Prescrip. Serv.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970) (*Snyder's* prohibition on aggregation of class claims precludes valuation of requested injunctive relief from defendant's viewpoint); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970) (separate and distinct class claims requesting monetary and injunctive relief may not be aggregated to satisfy jurisdictional amount); *Rosado v. Wyman*, 414 F.2d 170, 176 (2d Cir. 1969) (in injunctive class action, the "claims of the members of the class may not be aggregated to satisfy the $10,000 requirement"), *rev'd on other grounds*, 397 U.S. 397 (1970).

Mr. Upp does not, and cannot, cite a single conflicting decision.[2] Instead, he attempts to create confusion by

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[2] Even Professor Moore, liberally cited by Mr. Upp, acknowledges that *Snyder* and *Zahn* preclude use of the "defendant's viewpoint" approach in a class action. 1 James W. Moore et al., *Moore's Federal Practice* ¶ 0.91[1] at 819-20 (2d ed. 1993).

misapplying a general proposition, namely: "[t]his Court's long-established rule . . . that the amount in controversy in actions seeking injunctive or declaratory relief is measured by the 'value of the object of the litigation.' " Cert. Petition 8. This rule has never been applied to permit aggregation of separate and distinct claims in class actions. Indeed, under *Snyder* and *Zahn*, the value of the object in such litigation must be determined on an individual basis. In essence, Mr. Upp asks this Court to overrule *Snyder* and adopt the Total Detriment Rule in class actions.

This Court's decision in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), a case featured prominently in Mr. Upp's petition, is completely consistent with *Snyder* and *Zahn*. *Hunt* was not a class action; the federal question claim was brought by a state commission, which the Court treated as an association. 432 U.S. at 341-45. While noting that in actions seeking declaratory or injunctive relief, the "amount in controversy is measured by the value of the object of the litigation" (432 U.S. at 347), the Court held that the association met the amount-in-controversy requirement because, from the *plaintiffs' perspective*, at least some of the association's members had suffered losses in excess of the requisite jurisdictional amount. As indicated above, however, the individual members of the commission were not parties to the case, and the Court expressly stated that it did not need to "reach the aggregation" prohibition of *Zahn* and *Snyder*. *Id.* at 346.

Petitioner similarly miscites *Oklahoma Retail Grocers v. Wal-Mart Stores*, 605 F.2d 1155 (10th Cir. 1979), which also

is an association case, not a class action involving separate and distinct claims. These association cases contemplate the advancement of a common, unified claim through a single legal entity. The amount-in-controversy requirement in such cases may be satisfied by looking to the "value of the object" of the litigation, which in no way condones the aggregation of separate and distinct claims in class actions. Indeed, this Court has always distinguished association suits from class actions. *See International Union, United Automobile, etc. Workers v. Brock*, 477 U.S. 274 (1986).

The other cases cited by Mr. Upp also are inapposite as they either were not class actions[3] or involved the assertion of a common and/or constitutional right.[4]

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[3] *Healy v. Ratta*, 292 U.S. 263 (1934); *Mississippi & Missouri R.R. Co. v. Ward*, 67 U.S. (Black) 485 (1863); *Carey v. Pennsylvania Enterprises, Inc.*, 876 F.2d 333 (3d Cir. 1989); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979); *Duderwicz v. Sweetwater Sav. Ass'n*, 595 F.2d 1008 (5th Cir. 1979); *City of Milwaukee v. Saxbe*, 546 F.2d 693 (7th Cir. 1976); *Commonwealth of Massachusetts v. United States Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976); *Mas v. Perry*, 489 F.2d 1396 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); *Kheel v. Port of New York Auth.*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Ronzio v. Denver & R. G. W. R. Co.*, 116 F.2d 604 (10th Cir. 1940).

[4] *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968); *Healy v. Ratta*, 292 U.S. 263 (1934); *Justice v. Atchison, Topeka and Santa Fe Ry.*, 927 F.2d 503 (10th Cir. 1991); *Smith v. Washington*, 593 F.2d 1097 (D.C. Cir. 1978); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Kheel v. Port of New York Auth.*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971), *rev'd on other*

These cases did not involve aggregation of separate and distinct claims; rather, they decided the very different issue of valuing a single or common right. As such, these cases are consistent with *Snyder* and *Zahn*, and no appellate court has ever held that these cases authorize aggregation of separate and distinct claims. Consequently, there is no controversy requiring resolution by this Court.

### C. Federal Rule of Civil Procedure 23(b)(2) Does Not, And Cannot, Alter The Jurisdictional Analysis.

Mr. Upp argues that the purpose behind Federal Rule of Civil Procedure 23(b)(2) would be frustrated by prohibiting aggregation. This Court soundly rejected this argument in *Snyder*:

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.' . . . Any change in the Rules that did purport to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 that 'these rules shall not be construed to extend or limit the jurisdiction of the United States district courts.' . . . To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. . . . Nor can we overlook

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*grounds*, 408 U.S. 1 (1972); *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

> the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.

*Snyder v. Harris*, 394 U.S. at 336, 337, 339, 341-42.

## CONCLUSION

This Court should not entertain Mr. Upp's invitation to overrule *Snyder* and *Zahn* where the issue was not properly presented below, where the lower courts have surrendered jurisdiction, and where no conflict in authority exists. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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